

[SEE SIGNATURE PAGE FOR ATTORNEY NAMES]

E-FILED 2/12/07

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

Case No: C03-05669 JW (RS)

Plaintiff,

V.

MICRO THERAPEUTICS, INC., a Delaware corporation, and DENDRON GmbH

**SECOND STIPULATED AMENDED
PROTECTIVE ORDER**

Defendants and Third Party Plaintiffs,

V.

BOSTON SCIENTIFIC CORPORATION and
TARGET THERAPEUTICS, INC.

Third Party Defendants

To facilitate production and receipt of information during discovery in the above-referenced action, Plaintiff The Regents of the University of California (“Plaintiff”), Defendants Micro Therapeutics, Inc. and Dendron GmbH (collectively “Micro Therapeutics” or “Defendants”), and Third-Party Defendants Boston Scientific Corporation and Target Therapeutics, Inc. (collectively “Boston Scientific” or “Third-Party Defendants”) have agreed and stipulated, through their respective counsel, to the entry of an order for the protection of trade secrets, private or other

SECOND STIPULATED AMENDED PROTECTIVE ORDER
JW (RS)

CASE NO. C 03 05669

1 confidential research, development, or commercial information that may be produced or otherwise
2 disclosed by them during the course of this action.

3 Upon consideration of the record and proceedings herein and the stipulation of the parties:

4 **IT IS ORDERED THAT;**

5 1. "Confidential Information" shall mean and include any documents (whether in hard
6 copy or computer readable form), things, deposition testimony, responses to requests for
7 production, or other information provided in discovery in this action ("Discovery Material"), which
8 contain non-public, confidential or proprietary information, whether personal or business-related,
9 including trade secrets, know-how or proprietary data, business, financial or commercial
10 information, or medical information. Any party to this action, or a third-party producing Discovery
11 Material in response to a subpoena ("Designating Party") may designate its Confidential
12 Information as CONFIDENTIAL. Confidential Information shall not include any Discovery
13 Material that:

14 a. Has been or becomes lawfully in the possession of the party receiving the
15 same ("Receiving Party") through communications other than production or disclosure in this
16 action; or

17 b. Has been or becomes part of the public domain by publication or otherwise
18 and not due to any unauthorized act or omission on the part of the Receiving Party.

19 1.1 There shall be two additional categories for those documents the parties feel have the
20 highest degree of competitive sensitivity because they include commercial licenses or pertain to
21 products that have not been released in the marketplace, involve planning, analysis, strategy and
22 forward looking projections for products in development.

23 a. Parties may designate documents "Highly Restrictive: Outside Counsel
24 Only." The provisions of this Order applicable to Confidential documents shall also apply to
25 documents marked "Highly Restrictive: Outside Counsel Only," except that "Qualified Persons"
26 under paragraph 5 shall be limited to paragraphs 5(a)-(d) (outside counsel), 5(f) (approved experts),
27 5(g) (audiovisual vendors), 5(h) (the Court), and 5(i) (copying services). This designation shall
28 apply only to the licenses of the parties and related documents.

1 b. Documents marked "BSC Highly Restrictive: Outside Counsel Only," shall
 2 be treated identically to "Highly Restrictive: Outside Counsel Only" documents, except that
 3 "Qualified Persons" under paragraph 5 shall be limited to Paragraphs 5(a)-(d) (outside counsel),
 4 5(e)(i) (The Regents Designated Personnel), 5(f) (approved experts), 5(g) (audiovisual vendors),
 5 5(h) (the Court), and 5(i) (copying services).

6 2. The designation of Discovery Material in the form of documents, responses to
 7 admissions and interrogatories, or other tangible materials (including, without limitation, CD-
 8 ROMs and tapes) other than depositions or other pretrial testimony as CONFIDENTIAL shall be
 9 made by conspicuously affixing the appropriate legend on each page (or in the case of computer
 10 medium on the medium and its label and/or cover) to which the designation applies. To the extent
 11 practical, the CONFIDENTIAL designation shall be placed near the Bates number. If a document
 12 has more than one designation, the more restrictive designation applies.

13 3. All designations of Discovery Materials as CONFIDENTIAL shall be made in good
 14 faith by the Designating Party and made at the time of disclosure, production, or tender to the
 15 Receiving Party, or at such other time as permitted by this Protective Order, provided that the
 16 inadvertent failure to so designate does not constitute a waiver of a claim to such designation, and a
 17 party may so designate Discovery Material thereafter subject to the protections of this Protective
 18 Order.

19 4. Inadvertent (*i.e.*, unintentional) production of documents (including physical objects)
 20 subject to work product immunity, the attorney-client privilege, the right of privacy, or any other
 21 applicable privilege, shall not constitute a waiver of the immunity or privilege, provided that the
 22 Designating Party shall notify the Receiving Party in writing of such inadvertent production
 23 promptly after the Designating Party discovers such inadvertent production. After notification is
 24 made, the Receiving Party shall immediately return to the Designating Party all copies of such
 25 inadvertently produced documents and shall immediately confirm in writing that all electronic
 26 copies have been deleted or destroyed. Nothing herein shall prevent the Receiving Party from
 27 challenging the propriety of the privilege or immunity designation by promptly filing an appropriate
 28 motion with the Court, but the Receiving Party shall not challenge the propriety of the privilege or

1 immunity designation on the grounds that the privilege or immunity was waived by production of
 2 the document. If no such challenge is brought, or if any such challenge is unsuccessful, no use shall
 3 be made of such documents during deposition or at trial, nor shall they be shown to anyone who
 4 was not given access to them prior to the request to return or destroy such documents. Furthermore,
 5 if no such challenge is brought, or if any such challenge is unsuccessful, the Receiving Party shall
 6 promptly confirm in writing that any analyses, memoranda or notes which were internally
 7 generated based upon such inadvertently produced information have been deleted and/or destroyed.

8 5. Subject to paragraph 6 of this Protective Order, “Qualified Persons” having access to
 9 Discovery Material designated CONFIDENTIAL in this action are:

10 a. Fenwick & West LLP and its employees whose duties and responsibilities
 11 require access to such materials;

12 b(1). Heller Ehrman LLP and its employees whose duties and responsibilities
 13 require access to such materials;

14 b(2). Proskauer Rose LLP and its employees whose duties and responsibilities
 15 require access to such materials;

16 c. Goodwin Procter LLP and its employees whose duties and responsibilities
 17 require access to such materials;

18 d. Folger Levin & Kahn LLP and its employees whose duties and
 19 responsibilities require access to such materials;

20 e. For all parties, designated in-house representatives, whose names are listed
 21 below and who now have responsibility for maintaining, defending, or evaluating this litigation and
 22 paralegal or clerical employees whose duties and responsibilities require access to such materials:

23 i. For Plaintiff The Regents, the following persons shall have access to
 24 Discovery Material designated CONFIDENTIAL by any party, including MTI, Dendron, Boston
 25 Scientific and Target: Marty Simpson, University Counsel; Candace Voelker, Director, Office of
 26 Technology Transfer; Rita Hao, University Counsel; Bernadette McCafferty, Technology Transfer
 27 Officer for the University of California, Los Angeles; and paralegal or clerical employees whose
 28 duties and responsibilities require access to such materials (“The Regents Designated Personnel”);

1 ii. For Defendants MTI and Dendron, the following persons shall have
 2 access to Discovery Material designated CONFIDENTIAL by The Regents: Cecily Hines, General
 3 Counsel for ev3; Thomas Wilder, Consultant for MTI and former President and CEO of MTI;
 4 Matthew Jenusaitis, President, Neurovascular Division; and Brian Strauss, Director of Research
 5 and Development for MTI; however, only Cecily Hines shall have access to Discovery Material
 6 designated CONFIDENTIAL by Boston Scientific, regardless of whether the Discovery Material is
 7 produced by The Regents or Boston Scientific;

8 iii. For Third Party Defendants, the following persons shall have access
 9 to Discovery Material designated CONFIDENTIAL by The Regents or MTI: Paul Sandman and
 10 Peter Gafner, in-house counsel for Boston Scientific and Target;

11 f. Independent consultants and expert witnesses retained by or for the parties
 12 and their counsel, including technical consultants and accounting or financial experts.

13 g. Vendors retained by or for the parties for preparing audiovisual aids, *e.g.*,
 14 exhibits, models, graphics and videotapes for use in the court room, as well as their staff,
 15 stenographic, and clerical employees whose duties and responsibilities require access to such
 16 materials, who are not current employees of any party to this litigation or of any direct competitor
 17 of any party to this litigation;

18 h. The Court, Court personnel, and stenographic and video reporters engaged in
 19 proceedings incident to this action; and

20 i. Outside document copying services, and/or document coding or
 21 computerization services.

22 6. Qualified Persons defined in paragraph 5(f) shall be allowed access to Confidential
 23 Information only after the Receiving Party has complied with the following procedure:

24 a. Before receiving any Confidential Information the person shall be furnished
 25 with a copy of this Protective Order and shall acknowledge, by executing the secrecy agreement
 26 form attached hereto as Exhibit A, that he or she has read this Protective Order, understands it, and
 27 agrees to be bound by it, and also expressly consents to the jurisdiction of this Court in connection
 28 with any proceeding or hearing relating to the enforcement of this Protective Order.

1 b. Outside counsel for the Receiving Party shall furnish a copy of the executed
 2 secrecy agreement form to the Disclosing Party, along with a curriculum vitae of the person.

3 c. The Disclosing Party will have seven (7) business days to object in writing to
 4 the disclosure of Confidential Information to the particular person. If objection to the disclosure is
 5 made within seven (7) business days, the objecting party shall, no later than five (5) business days
 6 after objection, petition the Court for an order prohibiting the disclosure at issue. The objecting
 7 party shall have the burden of persuasion that disclosure should not be made. If an objection is
 8 made, no Confidential Information shall be made available to the particular person until after the
 9 Court rules that disclosure can be made, so long as the objection is followed by a timely petition.

10 7. Confidential Information and the substance or contents thereof, including any notes,
 11 memoranda or other similar documents relating thereto, shall be used by a Receiving Party solely
 12 for the purpose of this action and any appeals therefrom, and shall not be disclosed or used in any
 13 other legal proceeding, including any legal proceeding, involving any of the parties. It shall not be
 14 made available, or disclosed, or summarized to any persons, including the parties, other than to
 15 Qualified Persons, and subject to the restrictions in this Protective Order. Confidential Information
 16 shall be maintained by the Receiving Party under the overall supervision of outside counsel.

17 8. Any person in possession of Confidential Information shall exercise reasonably
 18 appropriate care with regard to the storage, custody or use of such Confidential Information in order
 19 to ensure that the confidential nature of the same is maintained.

20 9. If Confidential Information is disclosed to anyone other than in a manner authorized
 21 by this Protective Order, the party responsible for such disclosure must immediately bring all
 22 pertinent facts relating to such disclosure to the attention of the Designating Party and make every
 23 reasonable effort to retrieve such Confidential Information and to prevent further disclosure.

24 10. When Confidential Information is discussed, quoted or referred to in any deposition,
 25 the disclosing party shall ensure that only persons permitted by paragraph 5 of this Protective Order
 26 to have access to such Confidential Information are present.

27 11. During the course of preparation for a deposition or testimony, a fact
 28 deponent/witness may be shown Confidential Information from another party's Discovery

1 Materials that appears to be authored or received in the normal course of business by the
 2 deponent/witness. Use of Confidential Information during a deposition shall be subject to
 3 compliance with this Protective Order.

4 12. Any deposition transcript containing Confidential Information shall be marked on
 5 the cover as CONFIDENTIAL as appropriate, and shall indicate as appropriate within the transcript
 6 what information has been so designated. Whenever possible, the stenographic reporter shall be
 7 requested to separate those portions of the transcript containing CONFIDENTIAL information and
 8 separately bind them from each other and from the non-confidential portions. However, a
 9 Designating Party may also designate any portion or all (if appropriate) of the transcript or exhibits
 10 as CONFIDENTIAL with page and line references as to the affected testimony, by so advising the
 11 deposition reporter (who shall accordingly indicate the designations in the transcripts or exhibits)
 12 and all parties in writing, within thirty (30) days after receipt of the transcript. Until thirty (30)
 13 days have passed after the receipt of any transcript, that entire transcript shall be deemed to be
 14 CONFIDENTIAL. It is understood that Qualified Persons pursuant to paragraph 5(f) may attend
 15 depositions and review deposition transcripts and exhibits. In the event of disagreement about the
 16 confidential status of a deposition transcript, it shall be treated as CONFIDENTIAL until this Court
 17 rules otherwise.

18 13. Any pleading, paper or other documents filed in this action which contains or
 19 discloses Confidential Information shall be filed under seal in accordance with Civil Local Rule 79-
 20 5 and Judge Ware's Standing Orders. A Party shall designate information disclosed at a hearing or
 21 trial as Confidential Information by requesting the Court, at the time the information is proffered or
 22 adduced, to receive the information only in the presence of those persons designated to receive such
 23 information and court personnel, and to designate the transcript appropriately.

24 14. Entering into, agreeing to and/or producing or received Confidential Information or
 25 otherwise complying with the terms of this Protective Order shall not:

26 a. Operate as an admission by any party that any Discovery Material designated
 27 as Confidential Information contains or reflects trade secrets or any other type of confidential or
 28 proprietary information entitled to protection under applicable law;

1 b. Prejudice in any way the rights of any party to object to the production of
2 documents it considers not subject to discovery, or operate as an admission to any party that the
3 restrictions and procedures set forth herein constituted adequate protection for any particular
4 information deemed by any party to be Confidential Information;

5 c. Prejudice in any way the rights of any party to object to the authenticity or
6 admissibility into evidence of any document, testimony or the evidence subject to this Protective
7 Order;

8 d. Prejudice in any way the rights of any party to seek a determination by the
9 Court whether any Discovery Material or Confidential Information should be subject to the terms of
10 this Protective Order;

11 e. Prejudice in any way the rights of any party to petition the Court for a further
12 protective order relating to any purportedly Confidential Information;

13 f. Prejudice in any way the rights of any party to petition the Court for
14 permission to disclose or use particular Confidential Information more broadly than would
15 otherwise be permitted by the terms of this Protective Order; or

16 g. Prevent any Designating Party from agreeing to alter or waive the provisions
17 or protection provided for herein with respect to any particular Discovery Material designated as
18 Confidential Information by that party.

19 15. The signing of this Protective Order or failure of a party, at the time it receives
20 Discovery Materials designated as CONFIDENTIAL to challenge or object to the
21 CONFIDENTIAL or designation shall not be deemed a waiver of its right to challenge or object to
22 the designations at any later time. Any party may at any time challenge the designation of any
23 Discovery Materials as CONFIDENTIAL and may request permission to use or disclose
24 information with the CONFIDENTIAL designation other than as permitted, pursuant to this
25 paragraph by serving (by facsimile transmission) a written request upon counsel for the Designating
26 Party at least five (5) business days before the date of the proposed disclosure and by providing
27 telephonic notice of such request on the same date as the facsimile is transmitted. Such request
28 shall specifically identify the Confidential Information, including Bates label, sought to be

1 disclosed and the name, title and function of the person to whom disclosure is desired to be made.
2 The Designating Party shall thereafter respond to the request in writing within five (5) business
3 days after receipt of same. Absent good cause shown, a failure to respond within such time shall
4 constitute consent to the request. If, where consent has been withheld, the parties are subsequently
5 unable to agree on the terms and conditions of disclosure, the matter may be submitted to the Court
6 for resolution by the party seeking disclosure. Disclosure shall be postponed until a ruling has been
7 obtained from the Court.

8 16. All provisions of this Protective Order restricting the use of information obtained
9 during discovery shall continue to be binding on the parties and all persons who have received
10 information under this Protective Order, after the conclusion of this action, including all appeals,
11 until further Order of the Court, unless the parties agree otherwise in writing. Any and all originals
12 and copies of Discovery Materials designated CONFIDENTIAL shall, at the request of the
13 Designating Party, be returned to the party within sixty (60) days after a final judgment herein or
14 settlement of this action, or, at the option of the Designating Party, destroyed in that time frame,
15 except that outside counsel for each party may maintain in its files one copy of each pleading filed
16 with the Court, each deposition transcript together with the exhibits marked at the deposition, one
17 copy of each piece of correspondence, and documents constituting work product which were
18 internally generated based upon or which include Confidential Information. In the event that
19 outside counsel maintains such documents, it shall not disclose material maintaining any type of
20 Confidential Information to any third party absent subpoena or court order. Upon receipt of any
21 subpoena for such information, the party receiving the subpoena shall immediately notify outside
22 counsel for the Designating Party of the subpoena so that the latter may protect its interests. In the
23 event that documents are returned to or destroyed at the request of the Designating Party, the other
24 party or its outside counsel shall certify in writing that all such documents have been returned or
25 destroyed, as the case may be.

26 17. Third parties who produce information in this action may avail themselves of the
27 provisions of this Protective Order and Discovery Material produced by third parties shall be
28 treated by the parties in conformance with this Protective Order.

1 18. Until such time as this Amended Protective Order has been entered by the Court, the
2 parties agree that upon execution by the parties, it will be treated as though it had been "So
3 Ordered."

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2 Respectfully submitted,
3

4 DATED: February 12, 2007
5

6 By: _____ /s/
7

8 FENWICK & WEST LLP
9 Lynn H. Pasahow (Bar No. 054283)
10 lpasahow@fenwick.com
11 Patrick E. Premo (Bar No. 184915)
12 ppremo@fenwick.com
13 Silicon Valley Center
14 801 California Street
15 Mountain View, California 94041
16 Telephone: (650) 988-8500
17

18 Attorneys for Plaintiff/Counter-defendant
19 THE REGENTS OF THE UNIVERSITY OF
20 CALIFORNIA
21

22 DATED: February 12, 2007
23

24 By: _____ /s/
25

26 HELLER EHRLMAN LLP
27 Michael K. Plimack (Bar No. 133869)
28 Michael.Plimack@Hellerehrman.com
333 Bush Street
San Francisco, CA 94104-2878
Telephone: (415) 772-6000
30

31 HELLER EHRLMAN LLP
32 John S. Skilton (*Pro Hac Vice*)
33 John.Skilton@Hellerehrman.com
34 David J. Harth (*Pro Hac Vice*)
35 David.Harth@Hellerehrman.com
36 Charles G. Curtis, Jr. (*Pro Hac Vice*)
37 Charles.Curtis@Hellerehrman.com
38 Michelle M. Umberger (*Pro Hac Vice*)
39 Michelle.Umberger@Hellerehrman.com
40 Gabrielle E. Bina (*Pro Hac Vice*)
41 Gabrielle.Bina@Hellerehrman.com
42 Sarah C. Walkenhorst (*Pro Hac Vice*)
43 Sarah.Walkenhorst@Hellerehrman.com
44 One East Main Street, Suite 201
45 Madison, WI 53703
46 Telephone: (608) 663-7460
47 Facsimile: (608) 663-7499
48

1
2 Attorneys for Defendants/Counterclaimants and Third
3 Party Plaintiffs MICRO THERAPEUTICS, INC. and
DENDRON GmbH

4 DATED: February 12, 2007

By: _____/s/_____

5 PROSKAUER ROSE LLP
6 Colin G. Sandercock (*Pro Hac Vice*)
7 csandercock@proskauer.com
8 1001 Pennsylvania Avenue NW
Washington, D.C. 20004
Telephone: (202) 416-6800

9 Attorneys for Defendants/Counterclaimants and Third
10 Party Plaintiffs MICRO THERAPEUTICS, INC. and
DENDRON GmbH

11 DATED: February 12, 2007

By: _____/s/_____

12 FOLGER LEVIN & KAHN LLP
13 Michael F. Kelleher (SBN 165493)
mkelleher@flk.com
14 Julie L. Fieber (SBN 202857)
jfieber@flk.com
15 Embarcadero Center West
275 Battery Street, 23rd Floor
16 San Francisco, California 94111
17 Telephone: (415) 985-2800

18 Attorneys for Third Party Defendants
19 BOSTON SCIENTIFIC CORPORATION and
TARGET THERAPEUTICS, INC.

20 DATED: February 12, 2007

By: _____/s/_____

21 GOODWIN PROCTER LLP
22 J. Anthony Downs (*Pro Hac Vice*)
jdowns@goodwinprocter.com
23 Roland H. Schwillinski (*Pro Hac Vice*)
rschwillinski@goodwinprocter.com,
24 Exchange Place
25 Boston, Massachusetts 02109-2881
26 Telephone: (617) 570-1000

27 Attorneys for Third Party Defendants BOSTON
28 SCIENTIFIC CORPORATION and TARGET
THERAPEUTICS, INC.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: February 12, 2007

By:



The Honorable Richard Seeborg
United States Magistrate Judge

EXHIBIT A

SECURITY AGREEMENT

I, _____, state:

1. I reside at _____.

7 2. I have read the Stipulated Amended Protective Order executed by counsel for the
8 parties on _____, 2007 on behalf of The Regents of the University of California, Micro
9 Therapeutics, Inc., Dendron GmbH, Boston Scientific Corporation and Target Therapeutics, Inc., in
10 the preparation and conduct of the action entitled *The Regents of the University of California v.*
11 *Micro Therapeutics, Inc., et al.*, Civil Action No. C 03 05669 JW (RS), United States District
12 Court, Northern District of California.

13 3. I am fully familiar with and agree to comply with and be bound by the provisions of
14 said Order. I understand that I am to retain all copies of any designated Confidential Information in
15 a secure manner, and that all copies are to remain in my personal custody until I have completed my
16 assigned duties, whereupon the copies and any writings prepared by me containing any designated
17 Confidential Information are to be returned to counsel who provided me with such material. I will
18 not divulge to persons other than those specifically authorized by said Order, and will not copy or
19 use except solely for the purpose of these actions, any information obtained pursuant to said Order,
20 except as provided in said Order. I agree to submit to the jurisdiction of the Court for purposes of
21 enforcement of the Order.

22 I state under penalty of perjury under the laws of the United States of America that the
23 foregoing is true and correct.

Executed on this ____ day of _____, 2007.